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No. 97-1895

In The

Supreme Court of the United States

October Term, 1997

MARY McCARTHY, et al.,

Petitioners,

vs.

PROVIDENTIAL CORPORATION, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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June 25, 1998

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QUESTION PRESENTED

Did the Ninth Circuit correctly hold that where a district court grants a defendant's motion to compel arbitration of all claims in an action and then *sua sponte* dismisses the action, the appeal should be dismissed for lack of jurisdiction under 9 U.S.C. § 16, without prejudice to a later, timely appeal after arbitration has run its course?

ALL PARTIES AND RULE 29.6 DISCLOSURE

Respondents were defendants-appellees before the Ninth Circuit Court of Appeals and consist of the following: Providential Corporation, Providential Home Income Plan, Inc., William J. Texido[1] and Feroze A. Waheed. Petitioners were plaintiffs-appellants before the Ninth Circuit Court of Appeals and consist of the following: Mary McCarthy, Perry and Eunice Williams, John de Ridder and Eda Kavin.

After the filing of this action, respondents Providential Corporation and Providential Home Income Plan, Inc. were acquired and later merged into Wilmington Savings Fund Society (FSB). Wilmington Savings Fund Society (FSB) has no subsidiaries that are not wholly owned. The parent company of Wilmington Savings Fund Society (FSB) is WSFS Financial Corporation.

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[1] Mr. Texido passed away in August, 1994.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Providential Corporation, Providential Home Income Plan, Inc., William J. Texido and Feroze Waheed respectfully oppose the petition of Mary McCarthy, et al., for a writ of certiorari.

OPINIONS BELOW

Petitioners correctly stated the opinions below.

STATUTORY PROVISIONS INVOLVED

Petitioners correctly stated the statutory provisions involved.

STATEMENT OF THE CASE

I. PROCEEDINGS IN THE DISTRICT COURT

Defendants Providential Corporation and Providential Home Income Plan, Inc. were Delaware corporations that originated, funded, serviced and sold reverse mortgage loans for qualifying senior citizen homeowners. Defendants Feroze A. Waheed and William J. Texido were co-founders of Providential and served at different times as Chief Executive Officer of Providential. A reverse mortgage loan allows a senior citizen homeowner to receive monthly, tax-free advances to supplement his or her current income, while repayment of the principal and

interest is deferred for as long as the borrower remains in his or her home. Pet. App. 22a.[2]

Plaintiffs Mary McCarthy, Perry and Eunice Williams and Eda Kavin are borrowers of Providential's reverse mortgage loans. *Id.* Plaintiff John de Ridder is the executor of the estate of Harriet Myers, a deceased borrower of a Providential reverse mortgage loan. *Id.* Each of the reverse mortgage agreements entered into by petitioners with Providential contained a broad and unremarkable arbitration agreement:

> 7.11. Arbitration. Any controversy or claim arising out of or relating to the Loan Documents, the breach thereof or the default thereunder, shall be settled by binding arbitration under the jurisdiction of the American Arbitration Association in accordance with its Commercial Arbitration Rules. The arbitration shall be conducted in the city of San Francisco. Judgment upon any award rendered by the arbitrator may be entered in any appropriate court.

Pet. App. 25a-26a. Thus, the arbitration agreement required that all disputes "arising out of or relating to" the loan transaction (with certain enumerated exceptions) would be resolved through binding arbitration by the American Arbitration Association.

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[2] Petitioners' petition for a writ of certiorari in this Court is referenced herein as "Pet. ___." The appendix included with the petition is referenced herein as "Pet. App. ___."

On February 23, 1994, plaintiffs filed a putative class action complaint against defendants alleging, *inter alia*, violations of the Truth-in-Lending Act, 15 U.S.C. § 1601 *et seq.* and Regulation Z promulgated thereunder.

On May 13, 1994, defendants filed a notice of a petition to compel arbitration. Following briefing, on July 19, 1994, the district court held in a 22-page opinion that the arbitration agreements were valid and enforceable and granted defendants' motion. Pet. App. 21a-40a. The district court further held that it lacked authority to order a class-wide or consolidated arbitration. *Id.* at 39a.

Defendants did not request that the action be dismissed. Nevertheless, the district court held that, although a stay of proceedings pending arbitration is usually ordered, there was "no reason to stay these proceedings pending the arbitrator's decision." *Id.* The district court further held that it "ORDERS that the parties submit their claims to arbitration as required by their agreement" and dismissed the action. *Id.* At the same time, the district court entered a judgment that stated:

> This action is dismissed for the reasons set forth in the accompanying order. The Clerk of the Court shall close the file.

Pet. App. 41a.

II. PROCEEDINGS IN THE COURT OF APPEALS

The Ninth Circuit, in an opinion authored by Circuit Judge Brunetti and joined by Circuit Judge T.G. Nelson, dismissed plaintiffs' appeal for lack of jurisdiction, without prejudice to a later, timely appeal, after arbitration had run its course. Pet. App. 8a-9a. The court followed the analysis of the majority of courts examining the issue of interlocutory appeals under 9 U.S.C. § 16. It held that orders granting motions to compel arbitration in "independent" actions, *i.e.*, those in which arbitrability was the sole issue presented, could be directly appealed. On the other hand, orders granting motions to compel arbitration in "embedded" actions, *i.e.*, those in which arbitrability arose in a substantive suit pending before the district court, may not be directly appealed. Pet. App. 4a-5a.

In particular, the Ninth Circuit followed the Eighth Circuit's decision in *Gammaro v. Thorp Consumer Discount Co.*, 15 F.3d 93 (8th Cir. 1994), and held that orders granting motions to compel arbitration and dismissing the action in an "embedded" proceeding are not "final decisions" that may be directly appealed under 9 U.S.C. § 16(a)(3). Pet. App. 5a-6a. The court held that appellate review is not conditioned on whether or not the district court dismissed, rather than stayed, the underlying action pending completion of arbitration. It noted that Congress did not "intend[ ] [such an] arbitrary result when it barred appellate review of interlocutory orders compelling arbitration." *Id.* at 8a. The court noted that its interpretation of Section 16 is consistent with Congress' "clear desire to promote greater use of arbitration." *Id.*

Finally, the court took great pains to reiterate that dismissal of the appeal did not preclude review of the district court's order compelling arbitration. Instead, appellate review would be postponed until after the conclusion of the arbitration proceeding. *Id.* at 2a, 7a-8a, 8a-9a.

REASONS FOR DENYING THE PETITION

The Ninth Circuit correctly determined that the granting of a motion to compel arbitration under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, in an action in which the parties seek relief other than an order concerning arbitrability, may not be directly appealed under 9 U.S.C. § 16. The Ninth Circuit properly held that 9 U.S.C. § 16 directs that the decision granting the motion to compel arbitration may be reviewed by an appellate court after the arbitration has run its course. By so ruling, the Ninth Circuit joined the clear majority rule in determining that Section 16 reflected Congress' intent to proceed directly to arbitration without intervening appellate proceedings, and without the presentation of piecemeal appeals.

There is a difference of opinion on this issue among the Circuits. However, this intercircuit conflict largely has been resolved with six Circuit Courts of Appeals agreeing with the rule applied by the Ninth Circuit in this action. In addition, the issue presented in the petition is singularly unimportant – it does not deprive petitioners of the right to appeal the district court's order, it simply compels petitioners to wait until arbitration has run its course

to lodge such an appeal. Finally, even if the Ninth Circuit's decision is incorrect, it will have no impact, as a practical matter, on federal court litigation. Parties simply will ensure that district courts stay, rather than dismiss, actions raising issues other than arbitrability. In that event, it is plain that no appeal lies under 9 U.S.C. § 16(b)(1). As a result, the issue presented by the petition does not warrant review by this Court.

ARGUMENT

THE PETITION SHOULD BE DENIED BECAUSE THERE IS NO INTERCIRCUIT CONFLICT ON AN IMPORTANT MATTER THAT WILL AFFECT A SIGNIFICANT NUMBER OF CASES

I. The Ninth Circuit Correctly Followed the Majority of the Circuit Courts of Appeals in Dismissing the Appeal without Prejudice to a Later Timely Appeal.

A. Section 16 Governs Appellate Review of Orders under the Federal Arbitration Act.

Congress enacted the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, in 1925 and "declared a national policy favoring arbitration." *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). Consistent with that Congressional purpose, this Court repeatedly has held that arbitration agreements create a strong presumption in favor of arbitration. *See, e.g., Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

The FAA initially did not contain a provision concerning appellate jurisdiction. As a result, the Courts of Appeals developed different standards for appellate

review of arbitration orders that often turned on the distinction between law and equity under the *Enelow-Ettelson* doctrine.[3] Because the existing general statutes concerning appeals, 28 U.S.C. §§ 1291-2, had resulted in a state of confusion among the Circuit Courts of Appeals, Congress enacted a new provision of the FAA concerning appeals in the Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, § 1019, 102 Stat. 4642, 4670-71 (1988). In so doing, Congress clearly intended to "promote appeals from orders barring arbitration and limit appeals from orders directing arbitration." *Gammaro v. Thorp Consumer Discount Co.*, 15 F.3d 93, 95 (8th Cir. 1994). A Practice Commentary acknowledges that Section 16 "is a pro-arbitration statute designed to prevent the appellate aspect of the litigation process from impeding the expeditious disposition of an arbitration." David D. Siegel, Practice Commentary, 9 U.S.C.A. § 16, at 376 (West Supp. 1998).

As the text of Section 16 indicates, Sections 16(b)(1) and (2) prohibit appeals from interlocutory orders staying an action pending arbitration pursuant to FAA Section 3 and from orders compelling arbitration to proceed under FAA Section 4. Section 16(a)(3) permits an appeal to be taken from "a final decision with respect to an arbitration." Thus, Section 16 forecloses appellate review of a

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[3] *See Ettelson v. Metropolitan Life Ins. Co.*, 317 U.S. 188 (1942); *Enelow v. New York Life Ins. Co.*, 293 U.S. 379 (1935); *see generally* 19 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 202.11[7] at 202-59 (3d ed. 1998) (discussing *Enelow-Ettelson* doctrine); Richard Medalie, *The New Appeals Amendment: A Step Forward for Arbitration*, THE ARBITRATION JOURNAL, Vol. 44, No. 2 at 24-5 (June 1989) (same).

district court's decision granting a motion to compel arbitration unless the district court's order can be characterized as "a final decision with respect to an arbitration" pursuant to Section 16(a)(3) or falls within the specific exceptions found in Sections 16(a)(1) and (2).[4]

B. The Ninth Circuit followed the Majority of the Circuits in holding that Orders Compelling Arbitration in "Embedded" Proceedings are Interlocutory Orders that May Not be Directly Appealed.

The clear majority of the Courts of Appeals, including the Ninth Circuit, have distinguished between "independent" and "embedded" proceedings in determining

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[4] Petitioners point to a section by section analysis concerning Section 16 placed in the Congressional Record by Senator Heflin to support their view that a direct appeal may be taken from the dismissal of an "embedded" action in which arbitration is ordered. Pet. 13. This Record insert, not found in any committee report, should be given little weight. Even if the analysis inserted by Senator Heflin is considered, it does not address whether or not direct appeals are to be permitted from orders compelling arbitration in an "embedded" proceeding and dismissing the action. Instead, it simply discusses traditional notions of finality by stating that Section 16 appeals are permitted to "preserve the general policy that appeal should be available when there is nothing left to be done in the district court." Pet. 13 (quoting 134 Cong. Rec. S16284-01 (1988)). *See Catlin v. United States*, 324 U.S. 229, 233 (1945) (appeals generally permitted only when the decision "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment"). As discussed *infra* at 13-14, there *is* something left to be done in the district court: confirmation or consideration of any motions to vacate the arbitral award after the conclusion of arbitration. *See* 9 U.S.C. § 10.

whether or not a district court's order granting a motion to compel arbitration is "a final decision with respect to an arbitration" within the meaning of Section 16(a)(3). "Independent" proceedings are lawsuits in which the sole claim presented to the court is the arbitrability of the dispute. "Embedded" proceedings are actions in which a party seeks some relief other than an order requiring or prohibiting arbitration. *See, e.g., Seacoast Motors of Salisbury, Inc. v. Chrysler Corp.* ___ F.3d ___, 1998 WL 230055, at *2 (1st Cir. May 13, 1998); *Napleton v. General Motors Corp.*, 138 F.3d 1209, 1212-14 (7th Cir. 1998).

The Ninth Circuit's decision accords with decisions of the First, Second, Fourth, Fifth, Seventh and Eighth Circuits holding that a district court's decision granting a motion to compel arbitration in an "independent" proceeding is "a final decision with respect to an arbitration" that may be reviewed by a direct appeal. These courts have further held that a district court's decision granting a motion to compel arbitration in an "embedded" proceeding – as here – is *not* "a final decision with respect to an arbitration" under Section 16(a)(3) and a direct appeal may not be taken from such an order.[5]

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[5] *See Seacoast Motors of Salisbury, Inc. v. Chrysler Corp.*, 1998 WL 230055, at *2 (1st Cir. May 13, 1998) (order dismissing action and ordering arbitration in "embedded" proceeding is not directly appealable); *Napleton v. General Motors Corp.*, 138 F.3d 1209, 1212-14 (7th Cir. 1998) (same); *In re Pisgah Contractors, Inc.*, 117 F.3d 133, 136 (4th Cir. 1997) (order compelling arbitration is not "a final decision" under Section 16(a)(3) because arbitration issue was embedded in an action asserting other claims); *Ermenegildo Zegna Corp. v. Lanificio Mario Zegna, S.p.A.*, 133 F.3d 177, 181 (2d Cir. 1998) (" . . . in an embedded proceeding, the party that has unsuccessfully opposed arbitration must await

The clear majority of the Courts of Appeals thus agree that the distinction between arbitration orders in "independent" and "embedded" proceedings determines whether or not an order compelling arbitration may be directly appealed, or must await the conclusion of arbitration to be reviewed by the appellate courts. There are only two aberrational decisions by the Courts of Appeals. In *Arnold v. Arnold Corp. – Printed Communications For Bus.*, 920 F.2d 1269, 1276 (6th Cir. 1990), the Sixth Circuit held that when the action has been dismissed as a result of the granting of a motion to compel arbitration, a party may directly appeal the order granting the motion because there has been a "final decision." The *Arnold* court premised its decision upon its holding that the distinction between an "independent" and an "embedded" proceeding had been "reject[ed]" by Congress in enacting Section 16. *Id.* at 1276. This view has not been adopted by any other Court of Appeals. The *Arnold* court's decision has been criticized as erroneous by six Courts of Appeals, including the Ninth Circuit in this case. *See* Pet. App. 7a; *Seacoast Motors*, 1998 WL 230055, at *2; *Napleton*, 138 F.3d at 1212; *Altman Nursing, Inc. v. Clay Capital Corp.*, 84 F.3d 769, 771-72 (5th Cir. 1996); *Adair Bus*

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the conclusion of the arbitration before airing its arguments in opposition to arbitration before an appellate court"); *F.C. Schaffer & Assocs., Inc. v. Demech Contractors, Ltd.*, 101 F.3d 40, 42-43 (5th Cir. 1996) ("Once the district court has made the decision in an 'embedded' proceeding that the parties' dispute is arbitrable, this court lacks jurisdiction to review the district court's decision regarding the arbitrability of the parties' dispute. . . . "); *Gammaro v. Thorp Consumer Discount Co.*, 15 F.3d 93, 96 (8th Cir. 1994) (appellate courts do not have jurisdiction to hear appeals from arbitration orders in dismissed embedded proceedings).

Sales, Inc. v. Blue Bird Corp., 25 F.3d 953, 955 (10th Cir. 1994); *Gammaro*, 15 F.3d at 95.

In addition to *Arnold*, petitioners rely on another aberrational case, *Armijo v. Prudential Insurance Co. of America*, 72 F.3d 793, 797 (10th Cir. 1995). The Tenth Circuit held that when an action is dismissed upon the granting of a motion to compel arbitration, the appellate court may review the district court's order as a "final order." The *Armijo* court simplistically held that because defendants sought a dismissal, rather than a stay, and the court in fact entered a dismissal, it had appellate jurisdiction.[6] The *Armijo* court further held that if defendants had sought a stay but the court nevertheless dismissed the action (as in the case *sub judice*), the case should be remanded to the trial court for entry of a stay, as in *Adair*, 25 F.3d at 955. *Armijo*, 72 F.3d at 797. Thus, under *Armijo*, appellate jurisdiction is dependent not upon whether the action was dismissed or stayed, but on what specific relief the moving party requested in its motion to compel arbitration. As Professor Miller critically stated in his treatise, "The upshot of this ruling is that a defendant's strategic choices may control the availability of appeal." 15B C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3914.17 at 12 (1998 Supp.). The *Armijo* decision has not been followed by any other Court of Appeals.

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[6] The *Armijo* court strangely relied upon *Adair Bus Sales, Inc. v. Blue Bird Corp.*, 25 F.3d 953, 955 (10th Cir. 1994), which expressly *refused* to follow the *Arnold* court's reasoning with respect to Section 16. *Armijo*, 72 F.3d at 796-97.

The majority of the Courts of Appeals to have considered this issue have rejected the mutually inconsistent *Arnold* and *Armijo* decisions. As a consequence, although there is concededly some intercircuit conflict on this issue, it has largely been resolved with most of the Circuits following the majority view embraced by the Ninth Circuit in this case. Under such circumstances, the petition for a writ of certiorari should be denied.

C. Section 16(a)(3) is Consistent with the Final Judgment Rule in Section 28 U.S.C. § 1291.

Petitioners claim that the Ninth Circuit's construction of Section 16 "operates as a partial repeal" of 28 U.S.C. § 1291 and that this Court must grant the petition for certiorari to resolve the conflict between Section 16 and the final judgment rule. Pet. 15, 19. Petitioners' contentions are flawed.

As an initial matter, Congress has the power to enact statutes that determine the scope of appellate jurisdiction. As discussed *supra* at 6-8, in passing Section 16, Congress responded to confusion among the Circuits with respect to the standards for appellate review of arbitration orders under the FAA. This Court also acknowledged the state of confusion and the application of archaic standards to determine appellate jurisdiction prior to passage of Section 16. *See Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 282-88 (1988). Much of this confusion resulted from the absence of any uniform rules concerning the appealability of such orders; instead the courts were guided only by the general appellate standards contained in 28 U.S.C. §§ 1291, 1292. As a result, Congress

passed Section 16 to establish clear guidelines for the appealability of arbitration orders under the FAA. Hence, Congress intended Section 16 to provide new standards for appeals from arbitration orders under the FAA to supplant the old standards that had caused confusion and inconsistency.

In any event, Section 16 is consistent with the final judgment rule expressed in 28 U.S.C. § 1291. Section 1291 expresses the general rule that "a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (quoting *Digital Equipment Corp.*, 511 U.S. at 868 (citations omitted)). This Court long has stated that a district court's decision generally is appealable under this section only when the decision "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945); *see also Quackenbush*, 517 U.S. at 712 (quoting this standard).

The final judgment rule reflects Congress' policy against "piecemeal appellate review of trial court decisions." *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 430 (1985) (quoting *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982)). The decision below is entirely consistent with the rule.

The order at issue in this action does not "end[ ] the litigation on the merits and leave[ ] nothing for the court to do but execute the judgment." *Catlin*, 324 U.S. at 233. There is something left to be done in the district court,

irrespective of whether the action was stayed or dismissed: confirmation or consideration of any motions to vacate the arbitral award after the conclusion of arbitration. *See* 9 U.S.C. § 10. Indeed, parties commonly proceed to arbitration and then challenge the decision compelling arbitration by filing an appeal from the arbitration award. *See, e.g., First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 941 (1995) (reviewing determination as to whether or not dispute was arbitrable on motion to vacate the arbitral award under 9 U.S.C. § 10). Here, the district court's order represents a ruling on a procedural matter – the merits are left unresolved for the arbitrator to adjudicate. If petitioners were permitted to appeal the district court's determination that their claims must be arbitrated at this stage, petitioners would enjoy two bites at the same appellate apple: once after the district court's ruling on the order compelling arbitration and then another after an arbitration award or a judgment on the merits is entered. This is the piecemeal appeal process that Section 16 was enacted to avoid.

Professor Miller, in his Treatise, correctly noted that the proper course is to interpret Section 1291's finality requirement, as did the court below, flexibly to fulfill the pro-arbitration goals of Section 16:

> Most of the common questions are answered by § 16 in ways that clearly seek to foster arbitration even though at times there may be some sacrifice of the final judgment appeal doctrine. Section 1291 finality doctrine ordinarily should be adapted to reflect the same rules, so as to avoid the confusion and occasional forfeitures that would result from two different bodies of appealability doctrine.

15B C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3914.17 at 37-38 (2d ed. 1992). By recognizing that the granting of an arbitration motion in an "embedded" action is not truly "final" with respect to the controversy before it, the Ninth Circuit correctly harmonized the goals of both Section 16 and Section 1291.

II. The Issue Raised in the Petition Is Unimportant and Will Not Affect a Significant Number of Cases.

The petition for a writ of certiorari does not present an important issue warranting consideration by this Court as required by Supreme Court Rule 10. As an initial matter, the Ninth Circuit did not deny petitioners the right to appeal the district court's determination; instead, it noted that the appeal could only be heard at a later juncture, after the arbitrator reached a decision on the merits. Because the Ninth Circuit has not deprived the petitioners of the right to seek appellate review, but has only specified the point at which review is proper, petitioners, and parties in their position, do not suffer any prejudice. The issue raised is thus merely one of timing, without any substantive rights affected by the rule of decision.

The academic nature of the petition is further reflected in the sparseness of adjudications of this issue. By its nature, the question raised here never arises in the district court; moreover, even ten years after enactment of Section 16, not all Circuit Courts of Appeals have parsed the issue even once. And, as noted, of the courts that

have addressed the appealability issue, all but the mutually inconsistent *Arnold* and *Armijo* courts have agreed with the Ninth Circuit. There is little need to burden this Court's discretionary docket with this issue.

Finally, even if the majority of the Circuit Courts of Appeals, including the Ninth Circuit, are incorrect in determining that a direct appeal may not be taken from an order compelling arbitration in an "embedded" proceeding and dismissing the action, such a determination would have no impact on the handful of cases where this issue might arise. If this Court determined that the Ninth Circuit decision was wrong, as a practical matter, parties moving for arbitration would simply be more vigilant in seeking a stay, rather than a dismissal of an action, following a favorable ruling on a motion to compel arbitration. Section 16 explicitly provides that an appeal of an arbitration order in a stayed action may not be taken prior to the conclusion of arbitration. 9 U.S.C. § 16(b)(1). The advocacy of a stay by a party would hardly be manipulative or improper because Section 16 was specifically enacted to allow arbitration to proceed without intervening appeal. Thus, the issue raised by the petition is unimportant because its resolution by this Court would have no meaningful impact on federal court litigation.

CONCLUSION

For all of these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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